IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-140

KIWANIS CLUB OF GREAT NECK, INC., FLORENCE BROMLEY, CLARA HAFT, VIRGINIA NATHANSON and SUNYA STRICK,

Petitioners,

For a Declaratory Judgment

—against—

BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL and THE NEW YORK DISTRICT OF KIWANIS INTERNATIONAL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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Preliminary Statement on Behalf of Respondents

Facts

This application arises out of declaratory judgment proceeding against Kiwanis International and The New York District of Kiwanis International, seeking to void and nullify those provisions of the Kiwanis Constitution and By-Laws which restrict membership to "men".

There is no real dispute of fact involved in this case; it is rather a pure question of law. Plaintiff, Kiwanis Club of Great Neck, Inc., was a duly chartered local club of Kiwanis International. It was formed, organized and operated pursuant to the Constitution and By-Laws of Kiwanis International.

Some time in 1973-1974, several women (including at least the four female plaintiffs) were admitted to membership by the local club, despite the provisions of the International Constitution and By-Laws.

The International organization, upon being advised of this activity, told the local club that this was forbidden and, when they refused to change their status, the Board of Trustee of Kiwanis International met in session and voted a revocation of the membership charter of Kiwanis of Great Neck.

Kiwanis of Great Neck was advised of this activity and of their right to appeal to the next general convention of the International body which took place in June, 1975, at Atlanta, Georgia. The plaintiffs took advantage of this right of appeal and personally attended at the convention in the person their lawyer, Carol Eve Casher. They made their presentation; it was duly considered and very strongly voted down as an appeal.

Faced now with the execution of the revocation of their charter, the present lawsuit was instituted seeking a declaratory judgment to the effect that the Constitution and By-Laws are null and void because they discriminate against women by reason of the provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the New York State Constitution, the Federal Civil Rights Law, Section 340 of the General Business Law of New York, and Article 15 of the Executive Law of New York.

In connection with the institution of this lawsuit, the plaintiffs moved for a temporary or preliminary injunction by order to show cause. This temporary injunction order to show cause motion came on for hearing, at which time there was also before the court a cross-motion by the defendants for a dismissal of the complaint herein, on the ground that it failed to state any legal cause of action and/or for summary judgment in favor of the defendants. The motion for summary judgment was granted and it is from that determination that this appeal is taken as the determination was sustained by the Court of Appeals of the State of New York.

There was submitted in connection with said cross-motion, and in opposition to the motion for preliminary injunction, an affidavit setting forth in detail the various allegations of the complaint, the provisions of the Constitution and By-Laws of Kiwanis International and pointing out to the court the objects of Kiwanis, and the apparently incorrect belief of the president of the plaintiff Kiwanis of Great Neck, and of Ms. Florence Bromley, in which they seem to believe that the organization is involved directly in commerce, interstate or intrastate, and that they are being deprived of a right to make monetary gain by business contacts as members of this organization.

The line by line delineation of the papers, of the said Constitution and By-Laws and of the affidavits will not be unnecessarily repeated in this brief.

There is no claim in the moving papers, nor in the pleadings of any Federal or State government interest in the organization or operation of Kiwanis International or, for that matter, of the local club. The thrust of the complaint is that any organization which limits its membership to "men" thereby discriminates against women and that such discrimination is forbidden by the Constitution.

Submission of the Defendants-Respondents

The determination of the Supreme Court, County of Nassau, at Special Term, should be sustained as the petitioners failed to demonstrate a Federal or state government interest in the respondents' organization such as to make the by-laws and organization constitution in question constitutionally impermissible under U. S. or New York Constitutions.

It is the further submission of the defendants-respondents that to force the admission of women under the color of statute would be an invalid constitutional intrusion as far as the rights of the defendants-respondents are concerned.

The instant brief contains all points as they were made in the Courts of New York State including Points II and III which referred to state statutes upon which petitioners relied in part in the New York State Courts. The last is done so that this Court can have the benefit of the full argument made.

It is the position of the respondents that a Writ of Certiorari should not be granted under the terms of Rule 19 (1) of the Rules of the Supreme Court of the United States. It is submitted that no question is raised in the petitioners application this has not been decided by the Court. The question of the applicability of the Fifth and Fourteenth Amendments to private clubs has been ruled upon by this Court as will appear in the brief in chief. The determination is supportive of the respondents position.

In addition it is contended by the respondents that there is no basis for this Court to inquire into and reverse the factual findings of the Courts below as these findings were sufficiently supported by the evidence.

Lastly, it is submitted that if members of private clubs were to run the risk of being determined to be public vehicles if their members coincidentally discussed business matters this would have a chilling effect on the First Amendment free speech rights of their members. They would be faced with a constitutionally impermissible inhibition of the right of freedom of discussion. It is clear that a club whose purposes are non-business may choose its members without violating the United States Constitution.

POINT I

Kiwanis International is a private activity, a private club, whose objects have no connection with commerce, business or trade, and as such is not subject to any discriminatory regulations under the Fifth and Fourteenth Amendments of the United States Constitution and/or the Constitution of the State of New York.

One of the latest cases which deals with the very point now before the court is *New York City Jaycees, Inc.,* v. *United States Jaycees, Inc.,* 512 F. 2d 856. This case was decided March 7, 1975, by the United States Court of Appeals for the Second Circuit (including New York).

In this case, the defendant United States Jaycees, Inc., the national parent organization, threatened to revoke the charter of the New York City Jaycees, Inc., "because it had admitted women to membership." Thus we deal with almost exactly the same issue presented by the instant litigation. The United States District Court, Southern District, held that, because the Jaycees were in receipt of substantial government funding (amounting to 31.4% of its total budget) from Federal funds, its assumption of certain civic functions and its tax exempt status, it was thereby subject to constitutional limitations and could not discriminate against the female.

This decision of the lower court was reversed by the Circuit Court of Appeals, despite the above claims. The court in its decison states:

> "Plaintiff concedes, as it must, that private action is immune from the restrictions of the Fifth and Fourteenth Amendments. (Citing cases). However, plaintiff claims that National's receipt of federal funds and tax exemptions, as well as its performance of civic functions, constitutes state action sufficient to subject to it scrutiny under the constitutional standard. We disagree.
>
> "(i) The mere existence of government ties to a private organization is not sufficient to support a finding of state action. (Citing cases). • • •. The Supreme Court has recently reaffirmed the principle that the determination of state action must be based on a particularized inquiry focusing on whether there is 'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State iself.' (Citing cases). In this case the requisite connection between government and the offending activity has not been shown. Plaintiff does not charge discrimination in the operation of federally funded Jaycee programs; indeed such a claim could not be supported since not only do women participate both in the selection of local recipients for funding and in the implementation of programs but also the benefits of all federally funded Jaycee programs are distributed without regard to sex or other impermissibly discriminatory criteria. *Plaintiff's constitutional challenge is addressed solely to the internal membership policies of the Jaycees; yet plaintiff has made no showing that the government is substantially, or even minimally, involved in the adoption or enforcement of these policies.*
>
> "(2, 3) This is not case where 'the State has so far insulated itself into a position of interdependence with (the private enterprise) that it must be recognized as a joint participant in the challenged acivity • • •.' (Citing case) • • •. The mere

receipt of public funds does not convert the activities of a private organization into State activities (Citing cases). * * *.

"(4) Similarly, the grant of tax exemptions to the Jaycees does not constitute significant government involvement in the organization's exclusionary membership policy. As the Supreme Court has pointed out in the context of a First Amendment challenge to tax exemptions granted to religious organizations, a tax exemption does not constitute government 'sponsorship' but instead created only a minimal and remote involvement' (Citing cases). No genuine nexus between the tax exemption and the complained of internal membership policies has been shown and in its absence, there is no constitutional wrong.

"* * *. In fact, this Court has expressly recognized the 'value of preserving a private sector free from the constitutional requirements applicable to government institutions.' (Citing case). * * *. Furthermore, the Supreme Court in its recent decision in *Jackson* v. *Metropolitan Edison Company, supra,* has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the State, but that it must in addition be one which the State itself is under an affirmative duty to provide. (Citing case). In *Jackson* the Court specifically declined to find a State action on a public function theory despite the fact that the defendant was a utility company, provided an essential public service, enjoined a State protected partial monopoly, and was subject to extensive regulation by the State * * *.

"We therefore find ourselves in agreement with the Eighth and Tenth Circuits which, in reviewing suits brought by other complainants against the internal policies of the Jaycees, have similarly held that the requisite State action was lacking. (Citing cases). The Jaycees is a private organization acting in connection with its own enterprise, and the Federal Courts have no power to grant an injunction prohibiting its discriminatory membership policies."

Certainly, a much stronger argument can be made concerning a Junior Chamber of Commerce operation as being connected with "Commerce, Trade or Business" than can be made for the idealistic objects of Kiwanis International.

Plaintiffs in the complaint and the moving papers make no attempt to show any state or Federal government interest in Kiwanis and thus fail to state a cause of action because as the court above quoted stated:

"* * * Private action is immune from the restrictions of the Fifth and Fourteenth Amendments."

We find that the United States Court of Appeals, Tenth Circuit, reached exactly the same conclusion in *Junior Chamber of Commerce of Rochester, Inc., Rochester, New York* v. *United States Jaycees, Tulsa, Oklahoma,* on April 16, 1974, 495 F. 2d 883. Again, the court was dealing with a limitation of membership to males. The national organization revoked the charter of the local organization because they admitted women. The court disagreed and the appellate branch affirmed a dismissal of the complaint. We find the following language in the decision:

"The controversy was the result of the United States Jaycees' By-laws limiting membership to

males. On this account the Junior Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. * * *"

Claims were made of substantial tax benefits under the Internal Revenue Act, Federal grants and contracts from OEO and other departments of the Government and that Jaycee organizations used Federal funds to sponsor HEW programs, including housing projects and assistance to under-privileged children.

The court then states:

"From all of this, it is the position of the plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership policies, it is acting officially. On this basis, appellant's claim that their rights are subject to the protection of the Fifth and the Fourteeth Amendments * * * and are violated by the Jaycees exclusionary membership policies.

* * *

"There is no dispute about the invalidity of discrimination by the State or Federal Government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex. Therefore, the only issue is whether the discrimination can by reason of the circumstances present be considered official (State or Federal) action. It must also be conceded that private discrimination does not give rise to a constitutional violation. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)."

It is quite obvious from these decisions that there must be Federal or state connection with the organization before it can be subject to these alleged anti-discriminatory laws. This case also involves the Federal Civil Rights Law and dismissed its application under these circumstances.

We find the following in the court's language:

"The first question is whether there is a violation of 42 U.S.C. Section 1983 which gives a remedy to persons whose civil rights have been invaded by officers acting under color of State law. Although plaintiffs have invoked this provision they have not emphasized the official State action approach. Rather, the thrust of their argument is that there has been a violation of their constitutional rights because of the close relationships of the Jaycees with the United States government * * *.

"(3) We fail to see that there is present the essential State action. It is one thing to say that the private organization has State character where it induces, encourages or promotes private persons to accomplish what it is constitutionally forbidden to accomplish (Citing case). We do not have such encouragement or promotion here. The constitution applies if the private action complained of is in essence the action of the government (citing case). The plaintiffs would have us rule that because the Jaycees are used by the State government to dispense funds on its behalf that all their conduct automatically becomes State action subject to a Section 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the State must consistent with the Con-

stitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged State action. We disagree.

"Our Court has adopted a more restricted view of what is State action on at least two occasions. In *Ward* v. *St. Anthony's Hospital*, 476 F. 2d 671 (10th Cir. 1973) we ruled that a hospital which had received some governmental funding as a small percentage (5%) of its total construction funds was not subject to civil rights actions against the hospital board even though the operation of the hospital was extensively regulated by the State. It was stressed that the acts complained of did not thereby serve to clothe the hospital with sufficient State authority so as to constitute State action • • •.

• • •

"The membership policy against which the attack has been leveled has no connection with the State activity of the United States Jaycess. Neither the complaint nor the record establishes or promises to establish the kind of State involvement essential to a civil rights action under Section 1983."

It is respectfully submitted that this case is also directly apropos to the situation presented by the instant litigation and is compelling and controlling in its authority.

Plaintiffs, as pointed out hereinbefore, rely on the fact that women are excluded and that this is necessarily discriminatory and forbidden. They apparently totally overlook the multitudinous court interpretations as to discrimination, and the Civil Rights Law, all of which exclude purely private activity from the scope of such law and constitutional provisions and forbid enforcement thereof, against private organizations.

In *Browns* v. *Mitchell*, 409 F. 2d 593, the Tenth Circuit in discussing this problem specifically says:

> "(1, 2) It is axiomatic that the due process provisions of the Fourteenth Amendment proscribe State action only and do not reach acts of private persons unless they are acting 'under color of State law.' *United States* v. *Guest*, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966); *United States* v. *Price*, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966) (and several other cases).
>
> "It is clear as it always had been since the Civil Rights Cases • • • that 'Individual invasion of individual rights is not the subject matter of the (Fourteenth) Amendment' • • • and that private conduct abridging individual rights does no violence to the Equal Protection Clause (and likewise Due Process Clause) unless to some significant extent the State in any of its manifestations has been found to become involved in it."

This court will see that private conduct by Kiwanis International a private club organization, even though it abridges women's rights "does no violence to the equal protection clause and the due process clause" since the state is neither alleged to be involved nor as a matter of fact are they in any way involved with the operation of Kiwanis International and/or Kiwanis of Great Neck.

In another case, again dealing with female membership, *Junior Chamber of Commerce of Kansas City, Missouri* v. *The Missouri State Junior Chamber of Commerce, and the United States Jaycees*, 508 F. 2d 1031 (decided January 8, 1975), the Court of Appeals, Eighth Circuit, reversed a lower court granting of a preliminary injunc-

tion and dissolved the same. In support of its action, the court states:

> "(1-3) The Supreme Court has often stated that private action as distinguished from State action is immune from the equal protection restrictions of the Fourteenth Amendment (Citing cases). The parties concede that this same reasoning requires a finding of 'Federal action' before there is any deprivation of due process in violation of the Fifth Amendment (Citing cases). In either case, it is essential to show that there is a 'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself' (Citing case). • • •.
>
> • • •
>
> "(5) The mere receipt of government funds is not enough to make the action of the grantee *'Wahba' against New York University,* 492 F. 2d 96 (2d Cir. 1974) • • •. We do not think the heavy, suffocating hand of the Federal government should fall upon every aspect of the private sector."

Thus, it is well established that the private activity of Kiwanis International is not governed by the Fifth Amendment, nor the Fourteenth Amendment, nor the Federal Civil Rights Law and that the constitutional and By-laws provision restricting membership to males is a proper one with which the courts cannot legally interfere.

The plaintiffs, in their moving papers, prate upon the activities involved as "discriminatory" and certainly as impliedly "wrong". It must be urged strongly to this court that these are not substitutes for necessary Federal or state relationship which would invoke the provisions

of the Constitution and law hereinbefore set forth. In *Northrip* v. *Federal National Mortgage Association,* 372 F. Supp. 594, the court in discussing actions such as the present one states:

> "In order to sustain an action under this provision, plaintiff must demonstrate that there was State action involved in the alleged wrongful acts because the conduct of private individuals, however wrongful or discriminatory, does not come within the purview of the Fourteenth Amendment. *Hall* v. *Garson,* 430 F. 2d 430, 439 (5th Cir. 1970); • • •; *Shelley* v. *Kraemer,* 334 U. S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) Civil Rights cases, 109 U. S. 3, 11, 3 S. Ct. 18, 27 L. Ed. 835 (1883)."

In *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, which dealt with membership practices of a private club (fraternal organization), the court upheld the position of Moose Lodge in its restrictive membership practices even though they held a club liquor license from the Pennsylvania Liquor Control Board which the aggrieved party contended provided a state nexus to the activity. We find a statement by the United States Supreme Court:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause, if the private entity receives any sort of benefit or service at all from the State or if it is subject to State regulation in any degree whatever. Since State-furnished services include such necessities of life as electricity, water, and the police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases,

supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination,' *Reitman* v. *Mulkey,* 387 U. S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional provision."

The court specifically pointed out in distinguishing this decision from the *Burton* case, that the "Moose Lodge is a private social club in a private building" and further in connection with the State liquor controls licensing authority for the bar said:

"Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

There is no contention in the moving papers nor in the pleadings that Kiwanis leases, occupies or uses government property in connection with its meetings or its activities, nor that it is other than private social organization meeting when it does, in private buildings.

Still another case dealing with the same issue of sex is *Sterns* v. *Veterans of Foreign Wars,* 353 F. Supp. 473, decided by the District Court of the District of Columbia in 1972, involving a feminine attempt to join the Veterans of Foreign Wars, whose membership clause reads that members must have served honorably "as an officer or enlisted man in the Armed Forces of the United States." Plaintiff's contention was based on the due process clause of the Fifth Amendment because a Federal charter had been granted to VFW which she contended gave a Federal tinge to the activity. The court dismissed these arguments with the statement, "This Court

has concluded that neither of plaintiff's contentions is sound."

The argument on page 9 of the petitioners' brief in support of their application that the use of the words ". . . to render altruistic service, and to build better communities . . ." relate to a "public rather than a private organization . . ." is without basis in logic. If this argument were to be accepted it would signal the end of all pro lono publico community activity on the part of private clubs such as Chambers of Commerce, veteran's groups and the like. Is it inconceivable that a prerequisite for an organization remaining private must be to act only for the benefit of its members and never for the benefit of the community.

There is no question of discrimination in employment or the use of places of public accommodation in the instant case. Indeed if as the petitioners' seem to suggest in their brief in support of their application a prospective member was candid enough to admit they joined only for commercial reasons they would not be admitted to membership as not qualifying under the respondents' charter.

See also:

Central Hardware Co. v. *M.L.R.B.,* 92 S. Ct. 2238;
Arrington v. *City of Fairfield, Alabama,* 414 F. 2d 687;
Bond v. *Dentzer,* 494 F. 2d 302;
Palmer v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d 153;
Martin v. *Pacific Northwest Bell Tel. Co.,* 441 F. 2d 1116;
Cook v. *Advertiser Co.,* 323 F. Supp. 1212;

Keller v. *Kate Maremount Foundation,* 365 F. Supp. 798;
Smothers v. *Columbia Broadcasting System, Inc.,* 351 F. Supp. 622;
Rowe v. *Chandler,* 332 F. Supp. 336;
Johnson v. *Smith,* 295 F. Supp. 835;
Mulvihill v. *Julia L. Butterfield Memorial Hospital,* 329 F. Supp. 1020;
Belk v. *Chancellor of Washington University,* 336 F. Supp. 45;
Meicler v. *Aetna Cas. & Sur. Co.,* 372 F. Supp. 509;
Tanner v. *Armco Steel Corp.,* 340 F. Supp. 532.

POINT II

Section 340 of the New York General Business Law has no applicability.

The opening clause of Section 340 obviously highlights its inapplicability to a membership in a private club organization. It reads:

> "1. Every contract, agreement, arrangement or combination whereby
>
> "A monopoly in the conduct of any business, trade or commerce, or in the furnishing of any service in this State is or may be established or maintained • • •."

We are not dealing with a "contract, agreement, arrangement or combination" and we are not in any way dealing with the conduct of a "business, trade or commerce." This is membership in a private fraternal organization which has idealistic aims. It is not connected with commerce, trade or business.

There are no decisions which the writer can find which in any way attempt to apply Section 340 to a membership in a private fraternal organization such as Kiwanis. It is obvious that the inclusion of this section of the law by mention in the moving papers was merely to attempt a broader base of claim, without any actual foundation upon which to proceed.

It is also obvious that what was said in the many decisions quoted above concerning the constitutional provisions and the Civil Rights Law, would apply equally in any event to the present legislation.

If Section 340 transcends the above quoted decisions as to private clubs, then said Section 340 is, per se, unconstitutional itself.

POINT III

The Executive Law of New York, Article 15, does not provide any basis for relief by the plaintiffs in this litigation.

Section 290 of this law, in setting forth the purposes of the so-called "Human Rights Law," states:

> "2. It shall be deemed an exercise of the police power of the State for the protection of the public welfare, health and peace of the people of this state, and in fullfilment of the provisions of the Constitution of this State concerning civil rights."

Thus, its applicability to the present situation would be indeed far fetched. We are not dealing here with "pub-

lic welfare, health and peace." We are dealing with membership in a private fraternal organization.

Furthermore, the intent of this law is a supplement to "civil rights" and all of the decisions above quoted would have equal applicability to the present legislation. It is obvious that, not having so stated specifically, there was no intent by this law to extend its operations in a way that the Federal statutes and Constitution are not applied, and to extend it to a private organization such as Kiwanis.

The court's attention is also directed to Section 296 which defines "unlawful discriminatory practices." The court will note that it continues to refer to "employer," "employment agency," "labor organization," "employer or employment agency," "employer, labor organization or employment agency," "employer, labor organization, employment agency, or any joint labor management committee controlling apprentice training programs." It further makes specific reference to "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement." Obviously, Kiwanis does not fall under any of these definitions and the rule of legislative and contractual construction is that the use of specific words indicates an intent and should not be then stretched beyond the imagination by including "all others."

There is also reference to "owner, lessee, sublessee, assignee or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession" and also to "real estate broker, real estate salesman or employee or agent thereof." All of these are quite obviosuly areas in which racial and sexual discrimination may be and have been practiced. They

are for its correction. They have no application to membership in Kiwanis.

There is also reference to "education corporation or association," but this again has nothing to do with Kiwanis. Thus, as in the case of Section 340 of the General Business Law, Article 15 of the Executive Law has no application to the problem in the present litigation, is not in any way determinative thereof and has no application thereto. It cannot support the plaintiffs' claim in any way.

POINT IV

Kiwanis International is a private club which does not fall within the purview of the Civil Rights Act of 1964.

42 U.S.C. §2000a(e) 1964 specifically excludes private clubs from the Civil Rights Act of 1964. Subsection (e) of 42 U.S.C. §2000a(e) 1964 provides:

> "(e) The provisions of this subsection shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (6) of this section."

The very cases cited by the plaintiffs in their brief support the contention of the defendant that they are in fact a private club.

In *Wright* v. *Cork Club*, 315 Fed. Sup. 1143, U.S.D.C., S. D. Texas (1970), the court set forth the standards by which an organization must qualify if it is truly a private club. These standards are enumerated below:

1. Concern or plan for the selection of members.
2. Standards or plan for the screen of prospective members.
3. Use of facilities primarily by members only.
4. Club members dictate the policies of the club.
5. Nonprofit and/or noncommercial purpose in the forming of the club.

It is the defendant's contention and there can be no question of fact that the defendant meets the above criteria. Article II of the Constitution and By-Laws specifically sets forth the objects of the defendant Kiwanis International.

> "Section 1. The Objects of Kiwanis International shall be:
>
> "To give primacy to the human and spiritual, rather than to the material values of life.
>
> "To encourage the adoption and the application of higher social, business and professional standards.
>
> "To develop by precept and example, a more intelligent, aggressive and serviceable citizenship.
>
> "To provide, through Kiwanis clubs, a practical means to form enduring friendships, to render altruistic service, and to build better communities.
>
> "To cooperate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and good will."

As can be seen from the above, the defendant has no commercial objective. The Kiwanis was formed and operates only to better the community within which it exists. It is a non-profit organization enjoying a tax-free status. The defendant cannot control the individual members' objectives in becoming members, but can only try to coincide the individual's objectives with that of the organization.

Membership in the Kiwanis is strictly limited to those individuals residing or having other community interests within the area of this club. Article V, Section 4b, of the Constitution limits membership to those individuals who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life.

These limitations clearly comply with plan for membership as defined by the *Cork* case, *supra*. Further the standards for screening prospective members are also outlined in the Constitution. No one may become a member who does not meet the criteria set forth in Article V of the Constitution set forth hereinabove.

The defendant owns no facilities that are open to the public. Convention and national meetings are held in rented facilities and the purposes of the club as a whole have already been set forth above.

Clearly, the defendant is a private club within the guidelines of 42 U.S.C. §2000a(e) and is not subject to any of the provisions of the Civil Rights Act of 1964.

Defendants-respondents also urge, in support of their position, the reasoning and legal argument included in the two (2) affidavits of Reid A. Curtis incorporated in the record on appeal (pp. 38-82; pp. 159-170).

POINT V

No supporting proof was presented by plaintiffs-appellants as to any commercialism on the part of defendants-respondents—only proof of commercial view of Kiwanis Club of Great Neck.

The plaintiffs-appellants allege that they have made out a case requiring trial because of the lack of opposing affidavits by officers of Kiwanis International. Kiwanis International has proven on the record by way of its Constitution and By-Laws its nature as an altruistic and idealistic organization.

Plaintiffs-appellants' sole attack on this position is based upon a number of affidavits by members of the local group of Kiwanis of Great Neck. It is respectfully submitted that the alleged commercialism prevalent in this local group does not in any way change the purpose and organization of Kiwanis International.

The local group clandestinely admitted women as members and, subsequent thereto, amended its own By-Laws justifying the same.

As soon as this came to light, the Kiwanis International promptly revoked the Charter and the local group. The local group appealed to the Convention floor and lost.

The fact that commercialism may be the reason why some members of a local group join the organization does not in any way change the status of Kiwanis International as a private club, nor does it change its idealistic goals to mere commercialism.

The only other item proffered by plaintiffs-appellants in support of their position is a letter from an alleged

officer of the Citizens Southern National Bank which indicates that this person (presumably not even a member of a service club) permits a commercial attitude among his branch managers in urging their association with local service clubs.

There is not one word in the moving papers showing any active commercialism on the part of Kiwanis International nor on the part of the New York District of Kiwanis International. The case presents solely a question of law and not one of fact.

POINT VI

The by-law concerning the final determination of revocation of a local charter is not constitutionally impermissible.

The appellants' brief to this Court lays great stress on the arguments referable to constitutionality raised in the dissenting opinion of the learned Appellate Division.

The dissent of Shapiro, J. is two-pronged. It is argued that the Kiwanis International does not meet federal standards of a private club as set forth in *Wright* v. *Cork Club*, 315 FS 1143 (SD Texas, 1970).

This portion has been treated in depth above. However, for the purposes of replying to this portion of the Appellate Division dissent, it should be pointed out that the respondent has machinery for carefully screening applicants; the respondent has no physical facilities from which to exclude the public; the respondent is controlled by the membership who elect its officers; the respondent organization is non-profit for the benefit of its members and whatever publications the respondent has are directed

to its members for their information and guidance. All of the aforementioned have been established beyond peradventure.

The argument that the private club protection is lost because some peripheral economic benefit may accrue to members falls when examined against the background of reality. All private clubs are joined by some members for business as well as pleasure reasons. Lawyers sometimes join in the often-misplaced hope of gaining clients, salesmen, customers, doctors' patients, insurance agents, insureds, and so it goes. None of the aforementioned can be said to remove the private club aura as to the whole as if such were the case, no private club could survive a constitutional attack.

Turning to the argument that the by-law concerning the termination of a local chapter involves "state action by utilization of state court judgment or decrees to effectuate an action . . .", the dissent attempts to use this to distinguish the cases that are completely supportive of the respondents' position i.e., *Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Oklahoma,* 495 F 2d 883 (C.C.A. 10th) cert. den. 419 U. S. 1026 and *New York City Jaycees* v. *United States Jaycees* (512 F 2d 856 (C.C.A. 2d) from the case at Bar.

This position, it should be pointed out, was not raised by the appellant in its complaint or at Special Term, but developed sua sponte by the one dissenting justice in the Appellate Division, Second Department. The argument for this position must fall for two reasons: First, the by-law provides that the final determination of revocation of the charter is to be made by the respondent and the necessary legal steps to terminate the local chapter are to be taken only if the local chapter is incorporated. The judicial intervention, if such becomes necessary, is

essentially ministerial, the revocation already having taken place within the framework of the respondents' executive structure, the point being that the revocation requires no judicial intervention. Secondly, most, if not all, private clubs come within the purview of the Not-For-Profit Corporation Law (successor statute to the Membership Corporation Law) and its provisions provide among other things for methods of dissolution both non-judicial and judicial (Sections 1001 to 1115) and were the submission of the dissent accepted as valid, the fact that judicial intervention is available in such situations would preclude the existence of an exclusivity provision in the by-laws of any private club which, as has been demonstrated, is not the law of the state or land.

Summing up what is being attacked is the revocation of the local charter by the respondent which is achieved without judicial intervention and therefore is not constitutionally impermissible.

CONCLUSION

It will thus be seen that the plaintiffs have not shown any merit to their application for a temporary injunction at Special Term, nor is there any merit on the face of the matter to their complaint against the defendants, Kiwanis International and the New York District of Kiwanis International. The complaint failed to state a legal cause of action and to have allowed it to continue until reached for trial would have been an undue harassment of the defendants and would be a right to which the plaintiffs are not entitled.

Under the circumstances, the motion for temporary or preliminary injunction was properly denied, the cross-

motion of the defendants for judgment on the pleadings which was granted by Special Term should be sustained as well as the determination of the learned Appellate Division, Second Department and the Court of Appeals of the State of New York.

Respectfully submitted,

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